

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN**

HEATHER NELSON,
Plaintiff,
v.

Case No.: 11-cv-307

SANTANDER CONSUMER USA, INC.,
PATRICK K. WILLIS CO., INC.,
d/b/a AMERICAN RECOVERY SERVICE,
ASSETSBIZ CORP. d/b/a ABC RECOVERY,
Defendants.

Honorable Barbara B. Crabb

**DEFENDANTS' MOTION IN LIMINE NUMBER 3:
TO EXCLUDE ANY REFERENCE TO WITNESSES NOT CALLED BY SANTANDER**

Defendant Santander Consumer USA, Inc., Patrick K. Willis Co., Inc., d/b/a American Recovery Service, and AssetsBiz Corp. d/b/a ABC Recovery ("Defendants"), by their attorneys, respectfully request this Court enter an order *in limine* to exclude at trial any and all reference or argument to witnesses not called by Defendants, particularly employees.

The Court should bar the witnesses and counsel from mentioning absent witnesses because it would unfairly imply that Defendants are obscuring the facts of hiding key witnesses. Comment on the failure to produce a witness is improper if the witnesses is equally available for both parties or would otherwise offer only cumulative testimony already covered by other testifying witnesses. *See York v. Am. Tel. & Tel. Co.*, 95 F.3d 948, 955 (10th Cir. 1996); *Wilson ex rel. Wilson v. Merrell Dow Pharm. Inc.*, 893 F.2d 1149, 1151-52 (10th Cir. 1990); *see also United States v. Simpson*, 974 F.2d 845, 848 (7th Cir. 1992).

Many witnesses have been identified by plaintiff Nelson and Defendants throughout the course of this case or have otherwise been revealed during discovery. At the time of the phone calls and other relevant communications with Ms. Nelson, hundreds of employees worked at Santander's call center and a large number of employees placed the calls at issue. To date, only

6 employees to date have been deposed. An additional employed and three ex-employees may still be deposed. Accordingly, many of Defendants' employees and ex-employees who had contact with or attempted to contact Ms. Nelson will not testify at trial.

Moreover, while Defendants intend to call one or more of these witnesses to testify at trial, it is not obligated to do so. Nor are Defendants obligated to call any other witness. In the event Defendants opt not to call any or certain witnesses, Ms. Nelson should not be permitted to inaccurately imply that Defendants could have called these witnesses but chose not to because they have something to hide.¹

WHEREFORE, defendant Santander Consumer USA, Inc., Patrick K. Willis Co., Inc., d/b/a/ American Recovery Service and AssetBiz Corp., d/b/a/ ABC Recovery respectfully request that this Court enter an order precluding plaintiff Heather Nelson, her counsel, and all witnesses from disclosing or otherwise mentioning in the presence of the jury any and all references to any to witnesses not called by Defendants, particularly employees.

¹ To the extent Ms. Nelson intends to seek a missing witness instruction or otherwise argue about the absence of such witnesses, particularly those currently employed by Defendants or arguably under their control, this Court should first require Ms. Nelson to identify those witnesses in order to give Defendants the opportunity to address the lack of relevance or cumulative nature of their testimony or to call such witnesses at trial to avoid any unfair adverse inference to be argued by Ms. Nelson.

Dated: May 10, 2013

SANTANDER CONSUMER USA, INC.,
PATRICK K. WILLIS CO., INC., d/b/a
AMERICAN RECOVERY SERVICE
AND ASSETSBIZ CORP., d/b/a/ ABC
RECOVERY
Defendants

s/ David Z. Smith

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CERTIFICATE OF SERVICE

I, David Z. Smith, hereby state that on May 10, 2013, I electronically filed the foregoing **DEFENDANTS' MOTION IN LIMINE NUMBER 3** with the Clerk of the U.S. District Court for the Western District of Wisconsin using the ECF system, which will send notification to all parties of record.

By: /s/ David Z. Smith
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